

66849-8

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No. 66849-8-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON,  
DIVISION ONE

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STATE OF WASHINGTON,

Respondent,

v.

HOWARD LEE ROSS,

Appellant.

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COURT OF APPEALS DIV 1  
STATE OF WASHINGTON  
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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR KING COUNTY

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APPELLANT'S REPLY BRIEF

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LINDSAY CALKINS  
Attorney for Appellant

WASHINGTON APPELLATE PROJECT  
1511 Third Avenue, Suite 701  
Seattle, WA 98101  
(206) 587-2711

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A. ARGUMENT

1. THE TRIAL COURT ERRED IN ADMITTING THE IMPERMISSIBLY SUGGESTIVE AND UNRELIABLE SHOWUP IDENTIFICATION.

Outside on a Bellevue street at night, security guard Aaron Aiu identified Howard Ross as the man Aiu had seen at a Nordstrom store half an hour earlier. 1RP 36. Aiu had seen the man for less than two minutes; much of that time Aiu was either not paying direct attention to the man or the man's back was to Aiu. 2RP 7–9. Aiu described the man as having short, black hair, but a video of the incident showed that the man's hair was covered by a hat. 2RP 10, 22–23.

Before being taken to the showup location, Aiu was read an admonishment to be careful in his identification, but was also told that the police “may have stopped the person” who matched the description Aiu had given. 2RP 11, 15–16. When he arrived to the showup, Aiu saw Ross standing next to a police car with lights flashing, and saw Gucci merchandise next to him. 1RP 29, 36. Ross was the only suspect present at the show up. See 1RP 19. Aiu immediately identified him as the man who had been inside Nordstrom. 1RP 19. Aiu is Asian/Pacific Islander; Ross is African-American. Ex. 1 at 1, 13.

a. The response ignores or discounts critical factors that render this showup impermissibly suggestive. Appellant argued that the facts set out above establish that the showup identification was inadmissible because it was impermissibly suggestive and created a substantial likelihood of misidentification. AOB 11–19; see State v. Vickers, 148 Wn.2d 91, 118, 59 P.3d 58 (2002); Neil v. Biggers, 409 U.S. 118, 198–200, 193 S. Ct. 357, 34 L. Ed. 2d 401 (1972).

Respondent contends that the showup procedure was not impermissibly suggestive because 1) showups held shortly after the commission of a crime are “permissible,” 2) proximity to a police car does not “demonstrate unnecessary suggestiveness,” and 3) prior to his identification of Ross, Aiu was read an admonishment telling him to act carefully. SRB 8–9.

Each of these contentions is problematic. First, Respondent cites State v. Kraus for the proposition that showups are permissible. 21 Wn. App. 388, 392, 584 P.2d 946 (1978); SRB 8–9. Viewed in context, the Kraus Court wrote, “Although showups are generally suspect, they are not per se unnecessarily suggestive . . . A showup that is held shortly after the crime was committed and in the course of a prompt search for the suspect is permissible.” Id. at

392. The Kraus Court then went on to cite Russell v. United States. Kraus, 21 Wn. App. at 392. Russell explained the policy considerations that made showups permissible, while at the same time cautioning that “Unquestionably, confrontations in which a single suspect is viewed in the custody of the police are highly suggestive.” 408 F.2d 1280, 1284 (D.C. Cir. 1969). Thus Respondent’s statement that a showup is “permissible” does not demonstrate that the procedure is not impermissibly suggestive; in fact, Kraus and Russell stand for the proposition that showups are permitted for policy reasons in spite of their inherent suggestiveness. Kraus, 21 Wn. App. at 392; Russell, 408 F.2d at 1284.

Second, Respondent cites State v. Guzman-Cuellar to show that proximity to a police car does not indicate unnecessary suggestiveness. 47 Wn. App. 326, 336, 734 P.2d 966 (1987); SRB 9. In that case, this Court stated that the mere facts of being handcuffed and close to a police car were not enough to rise to the level of impermissible suggestiveness that would trigger an analysis of irreparable misidentification under Neil v. Biggers. Guzman-Cuellar, 47 Wn. App. at 336. That is not the argument here. Appellant argued that the 1) proximity to the police car, together

with 2) the fact that the police lights were flashing, 3) the fact that Ross was the only suspect present, 4) the fact that Aiu received a verbal affirmation from police prior to identifying Ross, and 5) the fact that Ross was situated next to merchandise all contributed to the undue suggestiveness of the showup. AOB 11–12. Respondent addresses only the proximity to the police car, and does not attempt to counter the authority cited by Appellant demonstrating that both the one-person nature of the showup and the verbal police affirmation rendered the procedure impermissibly suggestive. AOB 11–12; SRB 8–9.

Finally, Respondent asserts that the *pro forma* admonishment read to Aiu prior to the identification somehow diminished the highly suggestive nature of this one-person showup. SRB 9. But Respondent cites no authority for the idea that a standard admonishment may cure an impermissibly suggestive identification procedure; where no authority is cited it is assumed that none exists. Myers v. Harter, 76 Wn.2d 772, 782, 459 P.2d 25 (1969).

b. The State makes no attempt to apply the *Biggers* factors to this case, and has offered no authority in support of the trial court's erroneous admission of the showup evidence. The numerous cases that Appellant cited show that under the prongs enumerated in Biggers, the impermissibly suggestive showup procedure created a substantial risk of misidentification. AOB 12–17.

Respondent attempts no argument whatsoever on any one of the five Biggers factors. SRB 10. Instead, Respondent recites the facts. Id. The facts are undisputed. AOB 1–2 (assignments of error). The law in this state, as applied to those undisputed facts, shows that the showup procedure created a substantial likelihood of misidentification. AOB 11–17.

Next, Respondent asserts that this Court should not consider the contribution of the cross-racial nature of the showup to the substantial likelihood of misidentification. SRB 11. Respondent states that the inaccuracy of cross-racial identification was not properly raised in the trial court. Id. But the legality and quality of the showup was a prominent issue before the trial court; the only testimony introduced was in support of the lengthy 3.6 hearing prior to a stipulated facts trial. 1RP 9–39; 2RP 2–47. In State v. Monday,

the Supreme Court did not hesitate to review a claim of error based on racial bias in spite of a lack of objection below. 171 Wn.2d 667, 676–79, 257 P.3d 551 (2011). As recently explained by this Court, racial bias consistently affects the reliability of eyewitness identifications. State v. Allen, 161 Wn. App. 727, 735–36, 255 P.2d 784 (2011), rev. granted, 172 Wn.2d 1014. Whether the cross-racial nature of an identification procedure should be considered in assessing the likelihood of misidentification is an issue that is properly before this Court, and is ripe and timely for review. The authorities set out in the Opening Brief, uncontested by Respondent, demonstrate that the cross-racial nature of this showup procedure contributed to the substantial risk of misidentification. AOB 17–19.

**2. THE COURT HAD ADEQUATE REASON TO DOUBT MR. ROSS'S COMPETENCY, AND ERRED BY NOT ORDERING AN EVALUATION.**

Washington Statute mandates a competency determination “whenever there is a reason to doubt” a defendant’s competency. RCW 10.77.060(1)(a).

Appellant argues that the trial court violated due process by not following this statutory mandate in light of the various

indications that Ross may not have been competent to stand trial. AOB 21–24. For example, when Ross was arrested, he stated that he would be going on a spaceship. Id. He also stated that the police officer was micro-chipping him. Id. Further, during the colloquy before the stipulated facts trial, the following exchange occurred:

Court: Did anybody say you are going to be in trouble if you don't give up your right to trial?

Ross: No, I won't be in trouble if I keep talking about the things I can do. They don't tell me about this trial specifically, no.

Court: Okay. Did anybody promise you some sort of benefit or good thing if you give up your trial rights?

Ross: Well, not specifically the trial rights, I would say. But, I was told—well, I can't even say that. Oh, man.

Court: You may have had plea offers, but I'm asking something different, which is, did somebody say you're going to get a good—

Ross: What if I didn't see them say it, but, I know they say it, because I know how I talk to people.

Court: Okay. To your knowledge, has [the prosecutor] or anybody from the state promised you anything to get you to give up your right to see the witnesses testify or call your own witnesses?

Ross: From his mouth talking to me face to face?

Court: Yes.

Ross: No, I can't say that.

Court: But you suspect that the State—

Ross: I suspect it, yes.

Court: Is that why you're doing this, because you suspect the State wants you to give up your right to trial?

Ross: I suspect because I have been told in the way that, you know, basically that I was going to win regardless, and all that. So, you know. So, I mean, I feel like I'm going to win . . . . But [the prosecutor] didn't say that out of his mouth to me in my face.

[The Court asked the defense attorney if he knew of any promises implicitly or explicitly made to Mr. Ross, and the attorney demurred.]

Ross: What's implicitly?

Court: Something that isn't said but it's implied.

Ross: Oh no, it wasn't like that, it was more like ESP.

2RP 54–57.

Respondent contends that there simply was not enough of an indication that Ross might be incompetent to require the trial court to stop the proceedings and conduct an inquiry. SRB 13–15. First, Respondent claims that Ross's statements about micro-chipping and going on a spaceship could not have been evidence

of incompetence because the arresting officer opined that Ross was behaving “consistent[ly] with someone who had taken a stimulant, and/or hallucinogen.” SRB 14. If the fact that a person’s bizarre behavior may be consistent with drug use were sufficient to nullify a court’s duty to inquire into competency, then many who suffer from mental illness would be greatly prejudiced. See, e.g., State v. Marshall, 144 Wn.2d 266, 271, 281–82, 29 P.3d 192 (2001) (finding error when trial court failed to conduct a competency examination for defendant who experienced delusions and auditory hallucinations). These statements should not be discounted merely because a police officer, with no demonstrated medical training, believed that they may be the result of substance use rather than brain dysfunction.

Next, Respondent writes that “Ross may have been using ‘ESP’ in a less than literal sense, to refer to something like intuition.” SRB 14. Again, the fact that indicators of incapacity may seem ambiguous to some is not a reason to deny a competency hearing—in fact, the opposite is true. In conjunction with the ESP remark, Ross also stated “What if I didn’t see them say it, but, I know they say it, because I know how I talk to people.” 2RP 55. The colloquy strongly indicates that Ross could neither understand

the nature of the proceedings against him or assist in his own defense because he was being influenced by things that he imagined.

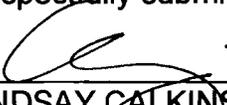
Respondent states, "The trial court was not required to order a competency evaluation based on these vague allusions." SRB 15. But Respondent cites no authority for that contention. Id. The statute shows that a trial court must order a competency evaluation whenever there is a reason to doubt a defendant's competency. RCW 10.77.060(1)(a). It does not require an evaluation whenever there is definitive evidence of incompetency. The trial court erred, and Mr. Ross's conviction should be reversed. See Marshall, 144 Wn.2d at 281–82.

**B. CONCLUSION**

For the reasons set forth above and the reasons stated in his Opening Brief, Mr. Ross respectfully requests that this Court reverse his conviction for burglary in the second degree.

DATED this 10<sup>th</sup> day of FEBRUARY, 2012.

Respectfully submitted:

  
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LINDSAY CALKINS (No. 44127)  
Washington Appellate Project (91052)  
Attorneys for Appellant